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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

Case No. C01-1351 TEH

**[PROPOSED] ORDER GRANTING
RECEIVER'S MASTER APPLICATION
FOR ORDER WAIVING STATE
CONTRACTING STATUTES,
REGULATIONS AND PROCEDURES,
AND APPROVING RECEIVER'S
SUBSTITUTE PROCEDURE FOR
BIDDING AND AWARD OF
CONTRACTS**

Receiver Robert Sillen submitted his Master Application for an Order Waiving State Contracting Statutes, Regulations And Procedures, And Approving Receiver's Substitute Procedure For Bidding And Award Of Contracts on April 17, 2007. The Court thereafter requested and received responses from the parties to the Receiver's Application.

In its February 14, 2006 Order appointing the Receiver, this Court sought to correct the two primary factors which created a need for the extraordinary remedy of a receivership: (1) the failure by California Department of Corrections and Rehabilitation ("CDCR") officials properly to manage the delivery of health care in California's prisons; and (2) the failure of the State of California, including its control agencies, properly to provide CDCR with the basic administrative services necessary to operate a constitutional prison medical delivery system, including the ability to enter into timely contracts. The Court vested in the Receiver the duty to control, oversee, supervise and direct all administrative, personnel, financial, accounting, contractual, legal and other operational functions of the medical delivery component of the CDCR. While the Receiver has the authority to manage the day to day operations of CDCR

1 medical care, when necessary remedial actions call for the waiver of State law, however, he must
2 seek such authority from this Court. Accordingly, this Court established a procedure by which
3 the Receiver could request waivers of State laws and contracts when necessary for him to
4 accomplish his work.

5 In the event, however, that the Receiver finds that a state law, regulation, contract,
6 or other state action or inaction is clearly preventing the Receiver from developing
7 or implementing a constitutionally adequate medical health care system, or
8 otherwise clearly preventing the Receiver from carrying out his duties as set forth
in this Order, and that other alternatives are inadequate, the Receiver shall request
the Court to waive the state or contractual requirement that is causing the
impediment.

9 Order Appointing Receiver, filed February 14, 2006, p. 5:4-9.

10 To date, the Receiver has made such requests only sparingly as he has spent the better
11 part of the last year building his operation, educating himself as to the complicated and
12 convoluted elements of the State's web of statutes, regulations, and rules and developing his
13 remedial plan. The current Application reflects that the pace of the receivership is quickening as
14 the Receiver begins to move from studying and learning about the problems to implementing
15 steps to remedy those problems.

16 In his Application, the Receiver has identified six broad categories of projects in which he
17 is currently engaged and which the Receiver has demonstrated are necessary to the remedial plan
18 he has developed for addressing the failings in the prison healthcare system. Those categories
19 are the following:

- 20 1. Medical Records and the Effective Management of Patient Care.
- 21 2. Clinical Space.
- 22 3. Recruitment of Staff and Staff Accountability.
- 23 4. Emergency Response Pilot Project.
- 24 5. Sound Fiscal Management.
- 25 6. Pharmacy Services.

26 The Receiver has indicated that he intends to award a number of contracts of varying size
27 and complexity in order to implement the foregoing projects. To that end, the Receiver has
28 requested that this Court waive certain specific requirements of State contracting law and

1 procedure with respect to the foregoing projects only and has requested that the Court approve
2 certain alternative contracting procedures that the Receiver has devised for his use in undertaking
3 to award the contracts.

4 The Receiver makes a convincing case that he should not be required to follow State
5 contracting laws and procedures to award contracts for the implementation of the projects. The
6 Receiver's Application sets forth a summary of the many statutes, rules and procedures that
7 comprise State contracting law. Even when presented in summary fashion, it is clear that the
8 procedures are complex, cumbersome and rigid. This Court has previously found that the State's
9 contracting process can take as long as two years from inception to the award of a contract and
10 that the process by which State contracts are developed, reviewed, bid and awarded contributes to
11 and exacerbates the numerous failings in the prison health care system. Findings of Fact and
12 Conclusions of Law ("FFCL"), filed herein on October 3, 2005, at pp. 26-27. To make matters
13 worse, the State has been unwilling or unable to speed up or streamline the contracting process
14 sufficiently to permit the crisis in the prison system to be addressed in a timely way. See Order
15 re State Contracts, filed herein on March 30, 2006.

16 The Receiver's proposed projects -- while separate and distinct -- are nevertheless
17 interlinked and interdependent. As the Receiver notes in his Application, "[i]mproved pharmacy
18 operations require improved recordkeeping, data retrieval and document management systems.
19 Improved recordkeeping, data retrieval and document management systems require improved and
20 upgraded IT. The system's IT cannot be improved without adequately trained personnel, and
21 new hardware and software. Every function in the system requires additional, usable space
22 which in turn requires securing the land upon which facilities will be built and then undertaking
23 competent analysis, design and construction of new facilities." Application, p. 32.

24 The Court agrees that requiring the Receiver to comply with State contracting procedure
25 with respect to even a part of these multi-faceted, interdependent projects would slow the
26 Receiver's work to a snail's pace at best and bring it to a grinding halt at worst. As the Receiver
27 states, "If even single contracts take months, and in some cases years, to be awarded under the
28 State's procedure, it is inconceivable that the Receiver could utilize that procedure to award the

1 many agreements discussed above and still move forward at a pace acceptable to this Court.” Id.
2 Indeed, it is not disputed by any of the parties that if the Receiver were required to follow State
3 procedures, his carefully coordinated remedial plans would move forward, if at all, only at a
4 glacial pace. This Court did not appoint the Receiver only to have him constrained by the very
5 burdens that have impeded the State in dealing with the undisputed challenges in the prison
6 health care system.

7 Moreover, the Receiver has demonstrated that no alternatives to a waiver currently exist
8 under State law. The Receiver has shown that he and his staff have discussed the limitations
9 inherent in State law with appropriate State officials on a number of occasions. Those officials
10 have acknowledged the many serious barriers erected by State law to effectuating prompt
11 remedial action and they have been unable to offer the Receiver any alternative other than to “get
12 an order from the Federal Court.”

13 Accordingly, for all the reasons set forth in the Receiver’s Application, the Court
14 concludes that complying with State contracting procedures with regard to these projects would
15 clearly prevent the Receiver from carrying out his duties under this Court’s February 14, 2006
16 Order and from developing and implementing a constitutionally adequate medical health care
17 system in a timely manner.

18 As he has recognized previously, the Receiver acknowledges his inherent obligation to
19 conduct all contracting operations in a fair and reasonable manner. The Receiver has set forth
20 alternative contracting procedures in his Application which endeavor to balance the need for an
21 open and fair process with his mandate to proceed expeditiously. Specifically, the Receiver has
22 identified three basic processes which are described more fully in his Application: formal
23 bidding, informal bidding and sole source. While each of these procedures deviates from State
24 law to a greater or lesser extent, they provide adequate guidance to contractors wishing to do
25 business with the Receiver and a sufficient basis upon which this Court can monitor the
26 Receiver’s activities. The Receiver has also identified a number of substantive requirements that
27 California law imposes on contracts and contractors with the State. The Receiver is not
28 requesting a waiver of these provisions, but has suggested a modified mechanism for attaining

1 compliance with them, *i.e.*, posting the required provisions on his website and requiring
2 contactors to attest that they have read and are in compliance with those requirements. The Court
3 finds that this approach is reasonable under all the circumstances.

4 In light of the foregoing, the entire record herein and good cause appearing, the Court
5 HEREBY GRANTS the Receiver's request for an order waiving State laws, regulations and
6 procedures governing the development, advertisement, bidding, award and protest of State
7 contracts, to the extent they might or would otherwise apply *only to the six categories of projects*
8 *and contracts described above*. The waiver includes, but is not limited to, the following:

- 9 • Gov't Code §§ 14825 – 14828 and SCM §§ 5.10A, 5.75, 5.80 (governing
10 advertisement of State contracts).
- 11 • PCC §§ 10290 – 10295, 10297, 10333, 10335, 10351, 10420 – 10425; Gov't
12 Code § 14616; SCM §§ 4.00 – 4.11; (governing approval of contracts by DGS and
13 exemption from and consequences for failure to obtain DGS approval).
- 14 • PCC §§ 10308, 10309, 10314; SCM vol. 2, SAM §§ 3500 – 3696.3 (governing
15 procurement of goods).
- 16 • PCC § 10337; Gov't Code § 19130 (requiring services to be performed by State
17 personnel unless exemption is justified and permitting review of contracts by
18 State Personnel Board).
- 19 • PCC §§ 6106, 10109 – 10126, 10129, 10140, 10141, 10180 – 10185, 10220,
20 10301 – 10306, 10340 – 10345, 10351, 10367, 10369; Gov't Code §§ 4525 –
21 4529.20, 4530-4535.3, 7070-7086, 7105-7118, 14835-14837; and Mil. &
22 Veterans Code §§ 999-999.13; 2 CCR §§ 1195 – 1195.6; SCM §§ 5.00 – 6.40 and
23 MM 03-10 (governing competitive bidding, required language in bid packages,
24 NCB procedures, preferential selection criteria, contractor evaluations and notice,
25 contract award and protest procedures for service, consulting service, construction
26 project management and public works contracts).
- 27 • PCC §§ 10314, 10346 (progress payment limitations).
- 28 • Gov't Code § 13332.09 and MM 06-03 (governing vehicle purchases).

- PCC §§ 12100 – 12113, 12120 – 12121, 12125 – 12128; SCM vol. 3; SAM §§ 4800 – 4989.3, 5200 – 5291 (governing procurement of IT, telecommunication and data processing goods and services and applicable alternate protest procedures).
- Gov't Code §§ 13332.10, 14660, 14669, 15853 (governing acquisition and leasing of real property).
- Gov't Code §§ 13332.19, 15815 (governing plans, specifications and procedures for major capital projects).
- PCC §§ 10365.5, 10371; SCM § 3.02.4 (governing restrictions on and approval for multiple contracts with same contractor).

The Court understands, and expects, that if the Receiver desires waivers with respect to projects not identified in the Application, he will seek separate and specific waivers with regard to those other projects.

The Court also GRANTS the Receiver's request for approval of the substituted notice, bidding and contract award procedures developed by the Receiver to be utilized in connection with the projects described in the Application, as well as his suggested approach for contractor certification of compliance with certain substantive contracting requirements imposed by State law.

The Court further ORDERS the Receiver to provide Defendants with prior notice of any contract he intends to award through the formal bidding process and to include in his quarterly reports to the Court, in addition to the other information he has proposed in his Application to include regarding bidding and bidders, a summary that specifies each contract he has awarded

1 during the quarter, provides a brief description of each such contract, identifies to which of the
2 six categories of projects each such contract pertains, and identifies the method the Receiver
3 utilized to award the contract (*e.g.* formal or informal bid).

4 **IT IS SO ORDERED.**

5
6 Dated: _____, 2007

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE